Supreme Court, U.S.
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No. 95-495

In The

Supreme Court of the United States

October Term, 1995

AARON SMITH TRUCKING COMPANY, INCORPORATED, and, WILLIAM IVEY WELLS,

Petitioners,

vs.

KENNETH KING, by his guardian, Debra Ann King,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the decision of the Fourth Circuit, that the plaintiff in a personal injury action did not assume the risk of injury to himself and that the issue of legal causation was a question for the jury, consistent with the law of the Commonwealth of Virginia?

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TO THE HONORABLE SUPREME COURT:

The Respondent, Kenneth King, by his guardian, Debra Ann King, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Aaron Smith Trucking Company, Incorporated and William Ivey Wells.

OPINIONS BELOW

This case was brought in the Western District of Virginia as a diversity of citizenship action pursuant to 28 *U.S.C.* § 1332, on February 20, 1992. On March 28, 1994, the Aaron Smith Trucking Company, Incorporated and William Ivey Wells' (hereafter Wells) motion for summary judgment was granted. Kenneth King's (hereafter Kenneth King or King) motion for partial summary judgment was denied. Kenneth King appealed to the Fourth Circuit Court of Appeals under 28 *U.S.C.* § 1291.

The Fourth Circuit unanimously reversed the judgment granting summary judgment to Wells by opinion dated June 28, 1995. The Fourth Circuit's opinion is reproduced in the Appendix to Wells' petition for Writ of Certiorari beginning at page 1a.

STATEMENT OF THE CASE

This suit arose because William Ivey Wells, a professional truck driver, acting in the scope and course of his employment, for Aaron Smith Trucking Company, Inc., at 6:30 a.m. on December 10, 1990, negligently blocked both

northbound lanes of travel of a four lane highway in the face of oncoming traffic.

It was very dark. Wells looked to his left and saw Kenneth King's car traveling north about 910 feet from him. The King car was the only car in the northbound lane for over one mile.

Wells pulled his tractor and flatbed trailer, a steel beam about five inches thick at waist high, and 48 feet long, straight across the road, completely blocking the right shoulder, both northbound lanes, and the median, rather than wait for Kenneth King to pass safely by, or turn right and make his turn from a proper turning lane, about a thousand feet up the road.

Wells knew that there was a dip in the southbound lanes which created a blind spot that could hide several cars from his view. Wells knew that if there were cars in the southbound lane he would have to stop, completely blocking both northbound lanes. Wells had to stop his tractor in the median to wait for southbound traffic to pass. The flatbed had three small amber lights, one at the front in the median, one off the right shoulder of the road, and one near or over the center lane. Twelve to thirteen seconds after completely blocking the road, the Volkswagen driven by Kenneth King ran under the flatbed trailer.

Kenneth King's skull was crushed causing severe brain damage, memory loss, loss of cognition, and loss of fine motor skills. As a result of the wreck, Kenneth King lacks the capacity to care for himself and will have to be cared for by his wife, the plaintiff, for the remaining years of his life.

Doctor Ellison Conrad, King's Opthamologist of 17 years, had tested his functioning visual acuity at 20/70 and had passed him for unrestricted employment, day or night. Several years before this wreck, he helped Kenneth King get a drivers license, restricted to daytime driving only. Dr. Conrad stated: "In my opinion to a reasonable degree of medical certainty, Kenneth's vision would not have prevented him from seeing a flatbed trailer at night."

Harry L. Snyder, Ph.D., professor emeritus of human factors engineering, at Virginia Polytechnic Institute, stated: "That the vision problems which Mr. King had did not cause or contribute to this accident because, in my opinion, it is probable that no driver would have seen this trailer prior to hitting it." Dr. Snyder's opinion was based on extensive education, experience, research and published writing on the subject of underride accidents.

Stephen B. Chewning, an expert in the field of traffic safety, stated: "In my expert opinion, based upon the pattern of the crash and the area in which it occurred, this particular type of trailer would be difficult to observe under the conditions prevailing at the time of the crash."

Both of King's experts pointed out that one could see under and over the flatbed. Therefore, the small amber lights would not provide a reference point for oncoming drivers, even if their visual acuity were perfect.

Notwithstanding the evidence recited above, the District Court granted the defendants' Motion for Summary Judgment ruling that Kenneth King voluntarily assumed the risk of injury to himself and was guilty of contributory negligence as a matter of law.

The Fourth Circuit Court of Appeals reversed the district court and correctly ruled that the issue of assumption of the risk did not apply and that whether or not King's negligence was the proximate cause of the wreck, was a question for the jury.

SUMMARY OF THE ARGUMENT

This case presents no issue appropriate for this Court's exercise of its discretionary jurisdiction. There are no pressing or unresolved legal issues in the present posture of the case. There is no federal question. Nor is there any question that the legal reasoning of the Fourth Circuit is sound and based on clear state precedent. The decision is plainly correct.

ARGUMENT I

IS THERE A GENUINE ISSUE OF FACT WITH RESPECT TO THE PROXIMATE CAUSE OF THE WRECK ON DECEMBER 10, 1990?

There exists a hotly contested issue of fact with respect to the issue of causation and this issue may be resolved only by a jury.

To determine the factual causation of this wreck, the Courts must use the "but for" or *sine qua non* rule. *Wells v. Whitaker*, 207 Va. 616, 151 S.E.2d 422 (1966).

Both King and Wells violated statutes and pursuant to Virginia law, the violation of a statute is negligence *per*

se, Butler v. Frieden, 208 Va. 352, 158 S.E.2d 121 (1967), and the violation of a statute may constitute contributory negligence. However, negligence on the party violating the statute must be the *proximate cause* of the injuries complained of in order to constitute contributory negligence. *W.B. Basset & Co. v. Wood*, 146 Va. 654, 132 S.E. 700 (1926).

In *W. B. Basset & Co.*, the plaintiff's decedent was struck by the defendant's vehicle while she was "jay-walking" across a street. The defense asserted at trial was that the plaintiff's decedent had violated the jay-walking statute and was guilty of contributory negligence and, accordingly, recovery was barred. In holding that the jury could have reasonably concluded that plaintiff decedent's action was not barred, the Virginia Supreme Court noted:

> In order for the negligence of the party violating the ordinance to be contributory or concurring, it must have some immediate casual connection, or be the proximate cause of the injury. If, while one is negligent – perhaps, the expression should be, in a state of negligence – another negligently employs an independent force, which, availing itself of the occasion afforded by the former's negligence, works a harm not its natural and probable consequences, but an independent harm, the first negligence is not contributory to the second.

Id. at 703. Accordingly, plaintiff's negligence is only pertinent if plaintiff's failure to exercise due care in driving at the time the accident occurred caused, in whole or in part, the accident which severely injured him. *See also Wilson v. Volkswagen of America, Inc.*, 445 F. Supp. 1368 (E.D. Va 1978).

Moreover, the issue of proximate cause is one which lies within the exclusive province of the jury, unless the evidence is such that reasonable minds could not differ with respect to the inferences to be drawn from the evidence. *Scott v. Simms*, 188 Va. 808, 51 S.E.2d 250 (1949).

Inasmuch as the plaintiff is entitled, upon consideration of a motion for summary judgment, to every inference from the facts most favorable to him, it is clear that a jury could find that plaintiff's eyesight was not the proximate cause of his injuries, and that *but for* Wells' negligence in pulling out in front of Kenneth King, blocking both north bound lanes, and failing to yield the right-of-way, there would have been no collision. *But for* the action of Wells in blocking both lanes of travel, Kenneth King would not have been injured. Accordingly, summary judgment is not proper and is precluded.

ARGUMENT II

KENNETH KING DID NOT ASSUME THE RISK OF INJURY AS A MATTER OF LAW.

The defense of assumption of risk is closely associated with the defense of contributory negligence. However, the jury, in determining whether a plaintiff was contributorily negligent, must use the objective "reasonable man" standard, whereas when considering whether a plaintiff voluntarily assumed a known risk, the jury must apply a "subjective" standard.

> The associated defenses of contributory negligence and assumption of risk differ in that an objective reasonable man test is brought to bear

> on the former while the standard primarily to be applied to the latter "is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates." (Citation omitted). Contributory negligence is carelessness. Assumption of the risk is venturousness and has two requirements: the nature and extent of the risk must be fully appreciated and the risk must be voluntarily incurred. (Citation omitted). "Knowledge of the risk involved is essential to its assumption." (Citations omitted).

Amusement Slides Corp. v. Lehmann, 217 Va. 815, 818, 819, 232 S.E.2d 803 (Va. 1977).

In support of their contention that King assumed the risk, as a matter of law, Wells argues that it is not necessary for them to establish actual knowledge of the danger. This is clearly not the law of Virginia.

Virginia law requires that, in order for the assumption of the risk defense to bar a claim, the injuries must have been proximately caused by the risk the plaintiff is alleged to have assumed. *Redd v. Ingram*, 207 Va. 939, 942, n.1, 154 S.E.2d 149, 152, n.1 (1967).

First a jury must determine that this particular plaintiff knew about and fully appreciated the risk which the defendant asserts caused plaintiff's injury. Second, a jury must find that the plaintiff voluntarily assumed the risk. *Id.* at 805.

"Furthermore, a driver has a right to assume that no vehicle will be stopped in his lane of travel on a public highway." *Biggs v. Martin*, 210 Va. 630, 172 S.E.2d 767 (1970); *Crist v. Fitzgerald*, 189 Va. 109, 52 S.E.2d 145 (1949). Kenneth King had the right to assume that there would

be no obstructions on the highway. *Hagan v. Hicks*, 209 Va. 499, 165 S.E.2d 421 (1969).

Kenneth King was not under an obligation to stop his car "within the range of his vision. The law of Virginia imposes no such duty." *Vanlandingham v. Vanlandingham*, 212 Va. 856, 188 S.E.2d 96 (1972).

King contends that Wells, by blocking traffic, caused the accident. Wells contends that it was King's eyesight that caused the accident. The defendants may only be found liable for Kenneth King's injuries if their actions were the *proximate cause* of his injuries. Accordingly, the defense of assumption of the risk is not applicable to this case as the Fourth Circuit correctly held.

CONCLUSION

Because the Fourth Circuit correctly applied Virginia law, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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